Supreme Court, U.S.
FILED

091495 JUN 4 - 2010

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JOHN VAN SALISBURY,
PERSONALLY AND TRADING AS
F/V MAJOR EXPENSE,

Petitioner,

v.

UNITED STATES OF AMERICA;
SECRETARY, UNITED STATES
DEPARTMENT OF COMMERCE/NATIONAL
OCEANIC AND ATMOSPHERIC ADMINISTRATION
(NOAA),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BURTON A. ROSE, ESQ.
1731 Spring Garden Street
Philadelphia, PA 19130
(215) 564-5550

JEFFREY M. MILLER, ESQ.
NASUTI AND MILLER
The Public Ledger Bldg., Ste. 1064
150 S. Independence Mall W
6th and Chestnut Street
Philadelphia, PA 19106
(215) 829-1101

Attorneys for Petitioner

Wright Appellate Services 0514
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

QUESTION PRESENTED

I. WAS THE PETITIONER'S RIGHT TO BE FREE FROM AN EXCESSIVE FINE UNDER THE EIGHTH AMENDMENT VIOLATED BY THE PENALTY IMPOSED IN THIS CASE BY THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions 1

Statement of the Case 2

Statement of Reasons in Support of Petition for Writ of Certiorari 4

The Petitioner's Right To Be Free From An Excessive Fine Has Been Abridged By The Decision Of The National Oceanic And Atmospheric Administration In Imposing A Grossly Disproportionate Penalty In This Case 4

Conclusion 10

TABLE OF AUTHORITIES

Cases:

United States v. Bajakajian, 524 U.S. 321 (1998) 3, 4, 8

United States v. Mackby, 261 F.3d 821 (9th Cir. 2001) 7

United States v. Byrd, 100 F.Supp.2d 342 (EDNC 2000) 7

Graham v. Florida, 2010 WL 1946731 (May 17, 2010) 7

Weems v. United States, 217 U.S. 349, 367 (1910) .. 7

Solem v. Helm, 463 U.s. 277 (1983) 7

BMW v. Gore, 517 U.S. 559 (1996) 8

United States v. Emerson, 107 F.3d 77 (1st Cir. 1997) 9

Balice v. United States, Department of Agriculture, 203 F.3d 8684 (9th Cir. 2000) 9

United States v. 3814 NW Thurman Street, 164 F.3d 1191 (9th cir. 1999) 9

United States v. Ford Motor Company, 442 F.Supp. 2d 429 (ED. MICH. 2006) 9

United States ex rel Tyson v. Amerigroup Illinois, Inc., 488 F.Supp. 2d 719 (NDILL 2007) 9

United States v. Mackby, 221 F.2d 1106 (ND CAL. 2002) 9

Other Authorities:

28 U.S. Code § 1254(1).....1

16 U.S. Code § 1858(a).....2, 6

16 U.S. Code § 1858 (b).....2

APPENDIX

Appendix A – Opinion, filed March 8, 2010 ..... 1a

Appendix B – Judgment, filed December 30, 2008 ..... 7a

Appendix C – Memorandum, dated December 30, 2008 ..... 9a

Appendix D – Order, dated December 30, 2008 ..... 22a

Appendix E – Initial Decision, dated June 13, 2007 ..... 24a

OPINIONS BELOW

See attached exhibits from United States District Court for the Eastern District of Pennsylvania (9 a) and decision of the United States Court of Appeals for the Third Circuit (1 a).

JURISDICTION

This Court has jurisdiction to entertain the Petitioner's claim that his right under the Eighth Amendment of the United States Constitution to be free from an excessive fine has not been honored in this case. A writ of certiorari is authorized sur 28 U.S. Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides that the no excessive fine shall be imposed.

STATEMENT OF THE CASE

The Petitioner is John Van Salisbury, a licensed New Jersey lobsterman who owns and operates a commercial fishing vessel known as Major Expense. In August 2004, agents of the National Oceanic and Atmospheric Administration opened an investigation after complaints that the Petitioner had tampered with, damaged and stole lobsters and fishing gear owned by another fisherman. The NOAA agents devised a sting operation whereby they placed forty lobsters in traps that were adjacent to traps of the Petitioner. A subsequent search of the Petitioner's fishing vessel revealed five of these lobsters in the catch of the Petitioner.

Thereafter, the Respondents brought an administrative action against the Petitioner under the Magnuson-Stevens Act, 16 U.S. Code §1858(a). Following hearings, an Administrative Law Judge concluded that the Petitioner had violated §1857 by tampering with protected fishing gear and by having stolen these five lobsters. The ALJ assessed a civil penalty upon the Petitioner of $152,000.00 and also suspended his fishing privileges for six months (24a).

On review in the United States District Court for the Eastern District of Pennsylvania pursuant to 16 U.S. Code §1858(b), the Honorable Eduardo Robreno affirmed the decision of the Administrative Law Judge (9a). See 2008 WL 5423487 (December 30, 2000).

An appeal was taken to the United States Court of Appeals for the Third Circuit as per Docket No. 09-1586. By Opinion dated March 8, 2010, a panel of that Court composed of Judges Sloviter, Roth and Tashima rejected the Petitioner's contention that the ALJ assessment was in violation of the Excessive Fines clause under this Court's decision of United States v. Bajakajian, 524 U.S. 321 (1998). See 2010 WL 772095 (3rd Cir. 3/8/10) (1a).

STATEMENT OF REASONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE PETITIONER'S RIGHT TO BE FREE FROM AN EXCESSIVE FINE HAS BEEN ABRIDGED BY THE DECISION OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION IN IMPOSING A GROSSLY DISPROPORTIONATE PENALTY IN THIS CASE.

Your Petitioner John Van Salisbury respectfully submits that this Honorable Court should grant review of the ruling of the United States Court of Appeals for the Third Circuit in this case that the assessment imposed upon him by the National Oceanic and Atmospheric Administration was not excessive in violation of the Eighth Amendment to the United States Constitution, which prohibits an excessive fine.

In United States v. Bajakajian, 524 U.S. 321 (1998), this Court ruled that a forfeiture of $357,144.00 (the amount that the Respondent had failed to declare as he attempted to leave the United States) violated the Excessive Fine Clause of the Eighth Amendment. The critical matter to be determined was whether that forfeiture was "grossly disproportional" to the gravity of the offense.

This Court established that rule that the amount of the forfeiture (or other penalty imposed by the Government) must bear some relationship to the gravity of the offense that it is designed to punish. If the fine is grossly disproportional to the gravity of that offense, it cannot withstand scrutiny under the Excessive Fines Clause. A penalty is "excessive" when it surpasses the usual, the proper or normal measure of proportion. Id. at 335.

In his Opinion for the Court, Justice Thomas held that the Respondent's conduct in failing to report his currency harmed the Government "in a relatively minor way" and specifically observed that the harm respondent caused was nowhere near thirty-three times greater than the amount of the maximum fine he could have faced if criminally prosecuted for that conduct.

In this case, the market value of the five lobsters that the Petitioner is accused of having taken from the lobster traps was $56.00. Yet the Petitioner was fined $152,500.00 and suspended from fishing for six months.[1]

---

[1] This Court can take judicial notice of the fact that a los of fishing privileges for a lobsterman for six months would constitute a substantial punishment for the Petitioner.

It is noted that of the Petitioner's catch at the time of the raid by the Agents, only five of over 700 lobsters were marked (the Agents had marked over forty lobsters in their sting operation).

The Court of Appeals decision needs to be examined by this Court because it appears to reject Petitioner's excessive fine argument on the basis that the Petitioner faced a maximum penalty of $240,000.00 pursuant to 16 U.S. Code § 1858(a) whereas the penalty of $152,500.00 was substantially below the statutory maximum penalty available. While it is true that the lower courts properly considered the question of the statutory maximum in determining whether a fine was excessive, this should not have been a controlling factor in the disposition of Petitioner's claim. Under such an approach, a penalty of this nature will never be deemed excessive unless it exceeds the maximum penalty, which it could not lawfully do. In a case such as this, where the Petitioner's alleged misconduct was relatively minor, the six month suspension and $152,500.00 fine were clearly grossly disproportionate to the gravity of his offenses. [2]

---

[2] The Petitioner notes that the Court of Appeals referenced the fact that the Petitioner had been previously cited for unlawful removal of lobster traps; however, the Petitioner observes that this prior violation occurred in 1995, some 9 years prior to the instant violation.

In the instant case, the ratio of the market value of the lobsters to the amount of the fine was 2714:1. The Petitioner notes that lower ratios have been upheld by Courts engaging in Excessive Fine Clause inquiries, and that the ratio involved in the instant case appears to constitute strong evidence that the penalty is grossly disproportionate. Cf. United States v. Mackby, 261 F. 3d 821 (9th Cir. 2001) (ratio of 11.5:1 upheld) and United States v. Byrd, 100 F. Supp. 2d 342 (EDNC 2000) (Ratio of 15.5:1 upheld).

This Court recently addressed the question of a grossly disproportionate penalty in Graham v. Florida, 2010 WL 1946731 (May 17, 2010). In that case, Graham had been convicted of Burglary and Robbery charges and sentenced to a term of life imprisonment without parole, even though he was a juvenile at the time of the crime. The Florida courts had ruled that Graham's sentence was not grossly disproportionate to his crimes. This Court cited the Eighth Amendment and concluded that the sentence was unconstitutional. The Court stated that the ban contained in the Eighth Amendment is the "precept of justice that punishment for a crime should be graduated and proportioned to the offense" citing Weems v. United States, 217 U.S. 349, 367 (1910) and Solem v. Helm, 463 U.S. 277 (1983) (where the Court held unconstitutional a life without parole sentence for the Defendant's seventh nonviolent felony, the crime of passing a worthless check).

In determining whether a penalty is grossly disproportionate, the Court will begin by comparing the gravity of the offense and the severity of the sentence followed by a comparison of the defendant's sentence with sentences imposed by other offenders in similar situations. [3] When this comparative analysis results in a judgment that the penalty was grossly disproportionate, it cannot stand under the Eighth Amendment. In the Graham case, the severity of the penalty (life without parole for a juvenile) lead the court to the conclusion that the sentence violated the Eighth Amendment.

See also BMW v. Gore, 517 U.S. 559 (1996) (penalty of $2,000,000.00 for failing to advise customers of minor predelivery repairs to new automobiles violated Eighth Amendment as being grossly excessive)

In this case, the Court would consider the degree of the Petitioner's reprehensibility, the relationship between the penalties and the harm caused by the petitioner to the victim and the sanctions imposed in other cases of comparable misconduct. United States v. Bajakajian, supra at 337. In consideration of all the factors that exist in this case, the Petitioner respectfully submits that the present matter presents the Supreme Court of the United States with an excellent opportunity to clarify the definition

[3] The Petitioner's first mate was also accused and his matter was settled for a fine of $7,500.00.

of what constitutes an excessive fine especially since the inferior federal courts have given different applications to this issue. [4]

[4] See *United States v. Emerson*, 107 F. 3d 77 (1st Cir. 1997) (penalty approved where defendant committed 37 violations and was fined $187,000.00); *Balice v. United States, Department of Agriculture*, 203 F. 3d 8684 (9th Cir. 2000) (penalty approved where defendant fined $225,500.00 which was less than his potential profit from unlawfully handling business operations); *United States v. 3814 NW Thurman Street*, 164 F. 3d 1191 (9th Cir. 1999) ($200,686.18 forfeiture violated Excessive Fines Clause as it was more than forty times the maximum fine permitted under sentencing guidelines; *United States v. Ford Motor Company*, 442 F. Supp. 2d 429 (ED MICH. 2006) (forfeiture of $12,000,000.00 was excessive where Government loss was only $391,804.00; *United States ex rel Tyson v. Amerigroup Illinois, Inc.* 488 F. Supp. 2d 719 (NDILL 2007) (under False Claims Act, $334,000,000.00 fine based on 18,130 false enrollment forms was not excessive) and *United States v. Mackby*, 221 F. 2d 1106 (ND CAL. 2002) (submission of thousands of false claims over four years permitted fine of $729,454.92.

CONCLUSION

For all the reasons expressed herein, your Petitioner John Van Salisbury respectfully prays that this Honorable Court agree to review this case on its merits and conclude that the penalties imposed by the Respondents in this case constitute a violation of his federal constitutional right to be free from excessive fines under the Eighth Amendment to the United States Constitution, and order appropriate relief in the interest of justice and fundamental fairness.

Respectfully submitted,

Burton A. Rose, Esq.
1731 Spring Garden Street
Philadelphia, PA 19130
(215) 564-5550

Jeffrey M. Miller, Esq.
Nasuti and Miller
The Public Ledger Bldg., Ste. 1064
150 S. Independence Mall West
6th and Chestnut Street
Philadelphia, PA 19106
(215) 829-1101

Attorneys for Petitioner

APPENDIX

APPENDIX A – OPINION, FILED MARCH 8, 2010

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

No. 09-1586

JOHN VAN SALISBURY,
PERSONALLY AND TRADING AS
F/V MAJOR EXPENSE

v.

UNITED STATES OF AMERICA;
SECRETARY, UNITED STATES
DEPARTMENT OF COMMERCE/NATIONAL
OCEANIC AND ATMOSPHERIC ADMINISTRATION
(NOAA)

JOHN VAN SALISBURY,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-07-cv-04881)
District Judge: Honorable Eduardo C. Robreno

Submitted Under Third Circuit LAR 34.1(a)
February 10, 2010

Before: SLOVITER, ROTH, and TASHIMA,[1] Circuit Judges

(Filed: March 8, 2010)

OPINION

SLOVITER, *Circuit Judge*.

John Van Salisbury Appeals a $152,500 penalty assessed by the United States Department of Commerce, National Oceanic and Atmospheric Administration ("NOAA"), for civil violations of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. §§

[1] Honorable A. Wallace Tashima, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting b y designation.

1801-1882. The District Court affirmed the assessment on cross motions for summary judgment. Van Salisbury claims the assessment was excessive and disproportionate to the wrongdoing, in violation of the Eighth Amendment Excessive Fines Clause. We will affirm.[2]

I.

Because we write primarily for the parties, our recitation of the facts is brief. Van Salisbury, a licensed New Jersey lobsterman, owns and operates the commercial fishing vessel Major Expense. In August 2004, after numerous complains that Van Salisbury tampered with, damaged, and stole lobsters and fishing gear owned by other lobsterman, NOAA special agents opened an investigation and planned a sting operation; they placed 40 uniquely marked lobsters in traps adjacent to Van Salisbury's. A search of the Major Expense revealed five uniquely marked lobsters in Van Salisbury's catch.

NOAA brought an administrative action against Van Salisbury under the Magnuson-Stevens Act for penalties and sanctions. Following a two-day hearing, a NOAA administrative law judge determined that Van Salisbury violated 16 U.S.C. §§

---

[2] We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

1857(1)(K)(i) (prohibiting removal of an damage to protected fishing gear) and law judge assessed a civil penalty of $152,500. Van Salisbury brought an action in the District Court under 16 U.S.C. § 1858(b) for judicial review; the District Court affirmed the assessment on cross motions for summary judgment.

The sole issue on appeal is whether the assessment was excessive in violation of the Eighth Amendment to the United States Constitution.[3]

II.

"Our review of a district court's grant of summary judgment in favor of an administrative agency is de novo." Allegheny Def. Project, Inc. v. United States Forest Serv., 423 F.3d 215, 229 (3d Cir. 2005). An agency's determination will not be reversed unless it was "arbitrarily, capricious, an abuse of discretion,

---

[3] Van Salisbury frames his argument as one of due process, but relies on Eighth Amendment jurisprudence, which is applicable.

Van Salisbury also makes a conclusory allegation that the District Court denied due process by granting summary judgment without a hearing. This allegation is unaccompanied by argument and is otherwise without merit. *See, e.g., AD/SAT v. Associated Press*, 181 F.3d 216 226 (2d Cir. 1999) ("a district court's decision whether to permit oral argument [on motions for summary judgment] rests within its discretion").

or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. A monetary assessment imposed as punishment is a "fine" within the meaning of the Excessive Fines Clause. See, e.g., United States v. Bajakajian, 524 U.S. 321, 327-34 (1998) (punishment forfeiture subject to Excessive Fines Clause scrutiny). Fines, like punitive forfeitures, are unconstitutionally excessive if "grossly disproportional to the gravity of a defendant's offense." Id. at 334. An evaluation of proportionality must take into account legislative "judgments about the appropriate punishment for an offense...." Id. at 336.

Van Salisbury violated the Magnuson-Stevens Act twice; each violation was punishable in August 2004, when the violations occurred, by a civil penalty of $ 120,000. 16 U.S.C. § 1858 (a); Civil Monetary Penalties; Adjustment for Inflation, 65 Fed. Reg. 65260 (2000) (codified at 15 C.F.R. § 64). The administrative law judge assessed a penalty of $152,500 for both violations, a substantial amount but well below the statutory maximum. Applying Bajakajian, the administrative law judge considered that Van Salisbury's "acts were not accidental or unintentional" and that his prior citation for removing lobster traps rendered him "acutely aware of the proscriptions

concerning fishing gear and lobsters." Supp. App. at 19. In assessing the gravity of Van Salisbury's offenses, the administrative law judge considered other factors, including economic harm to other lobsterman and documented potential for violent conflicts at sea. We conclude the civil penalty was not excessive; the agency's assessment was proper.

III.

For the reasons stated above, we will affirm the District Court's ruling.

APPENDIX B – JUDGMENT, DATED DECEMBER 30, 2008

IN THE UNITED STATES DISTRICT COURT-
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JOHN VAN SALISBURY,	:	CIVIL ACTION
Plaintiff ,	:	NO. 07-4881
v.	:	
	:	
UNITED STATES OF AMERICA, et al.,	:	
	:	
Defendants.	:	

JUDGMENT

AND NOW, this **30th day of December, 2008**, is hereby **ORDERED** that judgment is entered in favor Defendants, the United States of America, and Secretary, United States Department of Commerce/ National Oceanic and Atmospheric Administration ("NOAA"), and against Plaintiff John Van Salisbury.

AND IT IS SO ORDERED.

/s Eduardo Robreno

EDUARDO C. ROBRENO, J.

APPENDIX C – MEMORANDUM, DATED DECEMBER 30, 2008

IN THE UNITED STATES DISTRICT COURT-
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JOHN VAN SALISBURY,	:	CIVIL ACTION
Plaintiff ,	:	NO. 07-4881
v.	:	
	:	
UNITED STATES OF AMERICA, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

EDUARDO C. ROBRENO, J.

December 30, 2008

Plaintiff, John Van Salisbury,[1] and Defendants, the United States of America, and Secretary, United States Department of Commerce/ National Oceanic and Atmospheric Administration ("NOAA"), filed cross motions for summary judgment under Fed. R. Civ. P. 56(b). (Doc. nos. 5 and 7). For the reasons that follow, Defendants' motion for summary judgment will be granted (doc. no. 7) and Plaintiff's motion for summary judgment (doc. no. 5) will be denied.

I. BACKGROUND

Plaintiff brought this action against Defendants, seeking judicial review of the assessment of civil penalties issued against it in a civil administrative proceeding. NOAA charged Plaintiff with violations of the Magnuson-Stevens Fishery conservation an d Management Act ("Magnuson-Stevens Act"), 16 U.S.C. §§ 1801 et seq. Specifically, these charges allege that Plaintiff illegally removed, damaged, or tampered with fishing gear, and unlawfully stole lobsters contained in fishing gear, located in the Ex-

---

[1] Plaintiff John Van Salisbury filed this action both in his personal capacity and trading as FV Major Expense, a water craft.

clusive Economic Zone.[2] A final administrative decision was rendered which imposed the following: (1) $152,500 civil penalty against Plaintiff; (2) 180-day permit suspension of the vessel's permit; and (3) 180-day suspension of Plaintiff's operator permit. Plaintiff seeks judicial review of the administrative proceeding under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, arguing that the ALJ's liability determination and imposition of sanctions are unsupported by substantial evidence in the record. For the reasons that follow, both arguments will be denied.

A. Facts Found by ALJ

The ALJ's findings of facts are thoroughly detailed in the ALJ's decision and the Court need not duplicate these findings here. Only those facts which are pertinent to Plaintiff's objections are repeated as follows. NOAA Fisheries and the New Jersey Division of Fish and Wildlife received and documented nu-

---

[2] Under 50 C.F.R. § 600.10, "Exclusive Economic Zone" is the zone established by Presidential Proclamation 5030, 3 C.F.R. part 22, dated March 10, 1983, and is that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all waters from the seaward boundary of each of the coastal states to a line on which each point is 200 nautical miles (370.40 km) from the baseline from which the territorial sea of the United States is measured."

merous complaints concerning violence, threats of violence, destruction of property, threats of lobster trap destruction, lobster trap theft, and theft of lobsters from lobster traps. A large percentage of the complaints identified the Van Salisbury family as responsible for damaging and/ or stealing lobsters and lobster gear.[3]

Investigating this potential theft, Special Agents from NOAA Fisheries and Conservation Officers from the New Jersey Division of Fish and Wildlife placed uniquely identified lobsters in lobster traps in an active fishing area known as the "mud hole." With the assistance of cooperating witnesses, Joseph Horvath and his two sons, on September 20, 2004, 40 American lobsters were marked with unique and/ or standard identifiers.[4] At 12:23 a.m. on September

---

[3] Approximately 30-50 percent of the complaints identified the Van Salisburys as the lobstermen who damaged or stole other lobstermen's gear or lobsters from 2002-2004. (Doc. no. 5, p. 7 (citing AR-31)).

[4] Joseph Horvath and his sons were chosen as cooperating witnesses to the investigation for the following reasons: investigators never received complaints about the Horvaths tampering with lobster gear; the Horvaths submitted the majority of the complaints against the Van Salisburys; no other fishermen agreed to cooperate because of fears of retribution by the Van Salisburys; and the Horvaths were willing to cooperate.

21, 2004, investigators seeded 13 of the identified lobsters in the Horvath's line 33 trap, located in the mud hole, ensuring that the trap was secured so that the lobsters could not escape.

At 4:30 a.m. on the same date, John Van Salisbury traveled to the mud hold on the F/V Major Expense to engage in lobster fishing. At 5:15 p.m. that day, investigators inspected the F/V Major Expense's catch and uncovered 5 of the 13 lobsters that were seeded in the Horvath's line 33. On September 22, 2004, investigators inspected line 33 and discovered that it had been stolen, tampered with, or removed,

---

Plaintiff highlights that a family feud has existed between the Horvath and Van Salisbury families for many years.

Specifically, Plaintiff notes that "the feud, which involved not only verbal assaults but shootings, arsons, fights and otherwise, had resulted in Federal charges against both members of the Van Salisbury family as well as the Horvath family. Following a major shootout by and between a Horvath vessel and a Van Salisbury Vessel, one of the Horvaths had been convicted in Federal court of a Federal offense in New Jersey directly relating to the shooting and partial paralyzing of one of the Van Salisbury siblings." (Doc. No. 7, p. 3-4).

Transponders were attached to five of the lobsters, identified by an unique serial number that a receiver could locate and identify (Doc. No. 5, p.8 (citing AR-31).

and in its place was lobster gear which belong to John Van Salisbury.

B. Magnuson-Stevens Act

The Magnuson-Stevens Act was intended by Congress to protect the nation's coastal fish, the national fishing industry, and dependent coastal economies from the stresses caused by overfishing in the waters adjacent to territorial waters. 16 U.S.C. § 1801 (a) (1). Under the Magnuson-Stevens Act, the United States excercises jurisdiction over all commercial and recreational fishery resources within the 200 miles Exclusive Economic Zone ("EEZ"). Id. at § 1811 (a) and 1802 (6). Authority for the enforcement of the Magnuson-Stevens Act is vested in the Secretary of Commerce, as delegated to the Assistant Administrator for Fisheries of the National Marine Fisheries Service of NOAA.

The Magnuson-Stevens Act provides that it is unlawful for any person to negligently and without authorization remove, damage, or tamper with fishing gear that is owned by another person and is located in the EEZ, or fish contained in such fishing gear. Id. at 1857 (1) (K). Any person who is found by the Secretary, after notice and an opportunity for a hearing, to have committed a prohibited act may be assessed an administrative civil penalty not to exceed $100,000 per violation or have their fishing permits revoked, suspended, denied, or subjected to conditions or restrictions. Id. at §§ 1858 (a) and (g).

Any person against whom a civil penalty in the District Court by filing a complaint "within 30 days of the date of such order." Id. at § 1858 (b).

II. STANDARD OF REVIEW

In determining which party is entitled to summary judgment, judicial review of the Agency's decision is governed by 16 U.S.C. 1858 (b), which incorporates the standard of review of the APA, 5 U.S.C. § 706.[5]

---

[5] With approval of the Court, both parties have filed cross motions for summary judgment. However, the well rehearsed summary judgment standard, as articulated in Fed. R. Civ. P. 56 (c), does not apply because the underlying action is an appeal brought under the substantial evidence standard of the APA. Frontier Fishing Corp. v. Evans, 429 F. Supp. 2d 316, 322 (D. Ma. 2006); See also Calloway v. Harvey, No. 04-239, 2008 LEXIS 98158, at *12-13 (D.D.C. Dec. 4. 2008) (citing Sierra Club v. Mainella, 459 F. Supp. 2d 76, 89-90 (D.D.C. 2006)) ("where the parties request 'review of a final agency action under the APA, the standard set forth in Rule 56(c) does not apply because of the limited role of a court in reviewing the administrative record'"). The district court can employ summary judgment to "decide as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." Calloway, No. 04-239, 2008 LEXIS 98158, at *13 (citing Sierra Club, 459 F. Supp. 2d at 90).

Accordingly, in this case, review at the summary judgment level is a procedural device to bring the matter be-

Under Section 1858(b), an Agency's findings of fact underlying the civil penalty and permit sanction imposed will not be set aside unless they are found to be unsupported by the evidence. See Lovgren v. Byrne, 787 F.2d 857, 861-62 (3d Cir. 1986) (appropriate standard of review of ALJ's findings related to allege violations of regulations issued pursuant to the Act is whether such findings are supported by substantial evidence).[6] "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Citizens Publ'g & Printing Co. v. NLRB, 263 F.3d 224, 232 (3d Cir. 2001).

III. ANALYSIS

Plaintiff challenges two aspects of the ALJ's decision. First, Platinff argues that ALJ's determination of Plaintiff's liability for violations of the Magnuson-Stevens Act is not supported by substantial evidence. Second, Plaintiff contends that the financial penalty issued by the ALJ was excessive. For the

---

fore the Court. As a result, the Court need not address each motion separately, as would be the case in 56(c) review.

[6] Notably, judicial review of agency decisions is limited to the record before the agency when it made its decision. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

reasons that follow, both of Plaintiff arguments will be rejected.

A. Liability Under Magnuson-Stevens Act

Plaintiff contends that there is not substantial evidence to sustain Plaintiff's violation of the Magnuson-Stevens Act because the ALJ did not properly consider testimony pertaining to the long-standing dispute between the Horvath and Van Salisbury families as evidence of the Horvaths' potential corruption of NOAA's investigation. Specifically, Plaintiff alleges that "members of the Horvath family illegally tampered with the law enforcement operation to seek retribution against the Van Salisburys." AR-31, p. 18.[7] For the reasons that follow Plaintiff's contention is without merit.

The ALJ's decision recognizes Plaintiff's corruption argument, but notes that "the administrative record contains no evidence of such an occurrence." AR-31, p. 18. In addition, the ALJ states that Plaintiff's version of the facts was contradicted by the Horvaths' testimony. Id. (citing Tr. of Jan. 30, 2007 Hr'g, p. 20, 21, 55, 56, 76, 84, 96, 97, 99, and 100).

---

[7] Plaintiff suggests that the uniquely indentified lobsters were found in his possession because one or more of the Horvaths retrieved the seeded, marked lobsters from the Horvath traps and placed the lobsters in Plaintiff's traps. AR-31, p. 18 (citing Tr. of Jan. 30, 2007 Hr'g, p. 43-49; Pl. Brief, p. 2-4; Pl. Reply Brief, p. 2).

While, the ALJ acknowledges that Plaintiff presented evidence of "the history of acrimony" between the two families, he ultimately finds "the Horvaths' testimony credible and the [Plaintiffs] testimony not credible." Id. Rejecting Plaintiff's corruption argument, the ALJ states, "the Horvaths all credibly testified that they did not go out to the Mud Hole on September 21, 2004, after their traps were seeded." Id. (citing Tr. of Jan. 30, 2007 Hr'g, p. 20, 21, 55, 56, 76, 84, 96, 97, 99, and 100). In deciphering the conflicting versions of the facts, the ALJ made a credibility determination which substantiated his decision that Plaintiff violated the Magnuson-Stevens Act. Upon review of the ALJ's determination and the full record, the Court finds that the ALJ's decision was in fact supported by substantial evidence. Accordingly, the Court is not in a position to upset the ALJ's credibility determination under this standard of review.

B. Sanctions

Plaintiff contends that the financial penalty imposed by the ALJ is excessive and disproportionate to the alleged wrongful conduct. Substantiating this argument, Plaintiff argues that the $152,000 sanction issued by the ALJ is excessive when only five lobsters, "with a market value of approximately $56.00," are at issue. Plaintiff argues that there must be some proportionality between the alleged wrongdoing and the punishment. United States v. Bajakajian, 524 U.S. 321, 337 (1998). For the follow

ing reasons, the Court rejects Plaintiff's argument and concludes that the ALJ's sanctions are supported by substantial evidence in the record.

The ALJ discusses the factors that he considered in the determination of Plaintiff's sanctions in detail. Under 15 C.F.R. § 904.128 (a), "[f]actors to be taken into account in assessing a penalty . . . may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior offenses, and ability to pay; and such other matters as justice may require." Applying this provision to the instant case, the ALJ identifies the following facts as influential in his sanctions determination: (1) the 15 year history of conflict resulting in violence among lobstermen caused by theft of lobster gear, and related incidents, in the Exclusive Economic Zone of the New Jersey coast; (2) the resulting economic loss to lobstermen in the area; and (3) the letter issued by NOAA Fisheries and the Coast Guard to all lobster permit holders, reminding lobstermen of the severity of lobster/ lobster gear theft and/ or tampering and the resulting penalties. AR-31, p. 19.

Importantly, the ALJ acknowledges Plaintiff's argument but notes that "the value of the [five] lobsters and traps is only a small factor when considering the value of resources associates with this investigation in a hostile and volatile climate." Id. The ALJ considered Plaintiff's culpability and

concluded that Plaintiff was "actually aware" of the law against tampering with another fisherman's gear or catch, but nonetheless intentionally chose to commit the violations. Id.

Notably, the sanctions imposed by the ALJ are within the limitations of the Magnuson-Stevens Act, and less severe than other possible sanctions under the Act.[8] In addition, as Defendant highlights in its motion for summary judgment (doc. No. 5), the penalties imposed by the ALJ are consistent with past assessments for other violations.[9] Under these cir

---

[8] The Magnuson-Stevens Act authorizes the civil forfeiture of "any fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used, and any fish (or the fair market value thereof) taken or retained, in any manner, in connection with or as a result of the commission of any act prohibited by [the Act]." 16 U.S. C. § 1860.

In addition, the Magnuson-Stevens Act permits a civil penalty of up to $100,000 per violation. 16 U.S.C. § 1858 (a). Pursuant to the Debt Collection Improvement Act, this amount was adjusted upward to inflation to $120,000. 65 Fed. Reg. 65260 (Nov. 1, 2000) .

[9] For example, in Duckworth v. United States, the United States District Court for the District of Rhode Island, found that substantial evidence existed in the record to support the ALJ's imposition of a $50,000 penalty for possessing approximately 1,500 pounds of monkfish without

cumstances, the Court finds that the sanctions imposed by the ALJ were in fact supported by substantial evidence.

For the foregoing reasons, the Court finds that the ALJ's determination of Plaintiff's liability under the Magnuson-Stevens Act, and the resulting imposition of sactions were supported by substantial evidence in the administrative record. Accordingly, Defendants' Motion for Summary Judgment (doc. no. 5) is granted, and Plaintiff's Motion for Summary Judgment (doc. no. 7) is denied. An appropriate order follows.

---

a federal permit. No. 05-145S, 2006 U.S. Dist. LEXIS 13859, at *16-17 (D. R.I. March 22, 2006). See Also In re Clarke A. Reposa, Sr., 2003 WL 21734021 and 22072987 (NOAA) (NOAA imposed $45,000 against corporation solely owned by Reposa, Sr.; $40,000 against Reposa in his individual capacity; and 90-day vessel and operator permit sanctions against Reposa and his fishing vessel for landing approximately 1,500 pounds of illegal fish, making false oral statements/reports in attempt to cover up violations); In re Atlantic Spray Corp., 1997 WL 1402870 (NOAA) (NOAA issued civil penalties totaling $4.3 million, 5 vessel permit revocations, and a dealer permit revocation against two brothers and their closely held corporation for 181 violations of core conservation measures).

APPENDIX D – ORDER, DATED DECEMBER 30, 2008

IN THE UNITED STATES DISTRICT COURT-
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JOHN VAN SALISBURY,	:	CIVIL ACTION
Plaintiff ,	:	NO. 07-4881
v.	:	
	:	
UNITED STATES OF AMERICA, et al.,	:	
	:	
Defendants.	:	

O R D E R

AND NOW, this 30th day of December 2008, upon consideration of the parties' cross motions for summary judgment (doc. nos. 5, 7) and response thereto (doc. no. 8), it is hereby ORDERED that:

1. Defendants' motion for summary judgment (doc. no. 5) is GRANTED; and

2. Plaintiff's motion for summary judgment (doc. no. 7) is DENIED.

IT IS FURTHER ORDERED that the case shall be marked as CLOSED.

AND IT IS SO ORDERED.

/s Eduardo Robreno

EDUARDO C. ROBRENO, J.

APPENDIX E – INITIAL DECISION, DATED JUNE 13, 2007

UNITED STATES DEPARTMENT OF COMMERCENATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the matter of:	Docket No.
JOHN VAN SALISB URY,	NE043090FM/V
	(F/V MAJOR EXPENSE)

Respondent

INITIAL DECISION

Issued by: Walter J. Brudzinski, Administrative Law Judge

Issued: June 13, 2007

Appearances

For the National Oceanic and Atmospheric Administration

J. Mitch MacDonald, Esquire
Office of General Counsel, Northeast Region
One Blackburn Drive
Gloucester, Massachusetts 01930
Telephone: (978) 281-9379
Facismile: (978) 281-9389

For Respondent

Jeffrey M. Miller, Esquire
Nasuti and Miller
The Public Ledger Building, Suite 1064
150 S. Independence Mall West
6th and Chestnut Streets
Philadelphia, Pennsylvania 19106
Telephone: (215) 829-1101
Facimile: (215) 829-1105

STATEMENT OF THE CASE

The National Oceanic and Atmospheric Administration (NOAA or Agency) initiated this administrative proceeding for civil penalty assessment and permit sanction under the Magnuson-Stevens Fishery Conservation and Management Act (Manguson-Stevens Act), as amended and codified at 16 U.S.C. §§ 1801-1882.

On June 22, 2006, NOAA issued a Notice of Violation and Assessment of Administration Penalty (NOVA) and a Notice of Permit Sanction (NOPS), each comprised of two counts. Count one of the NOVA and NOPS alleged that on or about September 21, 2004, at or near Loran C. position 26848.6/43556.9, which is at or near 40° 13.42 North latitude - 73° 46.15 West longitude, John Van Salis

bury, the owner and operator of the F/V MAJOR EXPENSE (Vessel Permit No. 148820; Documentation No. NJ 0746GN, Operator Permit No. 10005903), by his own acts and through his employee, agent, or representative including, but not limited to, Christopher R. Loughery, being persons subject to the jurisdiction of the United States and named as respondents herein, unlawfully without authorization removed, damaged, or tampered with fishing gear owned by another person that was located in the Exclusive Economic Zone (EEZ). Specifically, Respondents unlawfully removed, damaged, or tampered with fishing gear owned by Joseph Horvath that was located at or near the above-identified positions, which is well inside the EEZ. Thus, the respondents violated 16 U.S.C. § 1857 (1) (K) (i).

Count two of the July 22, 2006 NOVA and NOPS alleged that on or about September 21, 2004, at or near Loran C position 26848.6/43556.9, which is at or near 40° 13.42 North latitude 73° 46.15 West longitude, John Van Salisbury, the owner and operator of the F/V MAJOR EXPENSE (Vessel Permit No. 148820; Documentation No. NJ0746GN; Operator Permit No. 10005903), by his own acts and through his employee, agent, or representative including, but not limited to, Christopher R. Loughrey, being persons subject to the jurisdiction of the United states and named as respondents herein, unlawfully stole fish in fishing gear owned by another person that

was located in the Exclusive Economic Zone (EEZ). Specifically, respondents unlawfully stole lobster from lobster fishing gear owned by Joseph Horvath that was located at or near the above identified positions, which is well inside the EEZ. Thus, Respondents violated 16 U.S.C. § 1857 (1) (K) (ii).

Title 16 U.S.C. § 1857 (1) (K) reads, in pertinent part, as follows: "It is unlawful - - - (1) for any person - - - (K) to steal or to attempt to steal or to negligently and without authorization remove, damage, or tamper with - - - (i) fishing gear owned by another person, which is located in the exclusive economic zone, or (ii) fish contained in such fishing gear. . . ."

Under 50 C.F.R. § 600.10, "Exclusive economic zone (EEZ) means the zone established by Presidential Proclamation 5030, 3 CFR part 22, dated march 10, 1983, and is that area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses all waters from the seaward boundary of each of the coastal states to a line on which each point is 200 nautical miles (370.40 km) from the baseline from which the territorial sea of the United States is measured."

The Agency assessed civil penalties in the amount of $80,000 for each count of NOVA for a total of $160,000 and suspended both the operator's permit (#148820) and the vessel's permit (#10005903) for a total of 180 days.

On July 6, 2006, the Respondents, through counsel, Jeffrey M. Miller, Esquire, requested a hearing and on July 11, 2006, the Agency forwarded this matter to the U.S. Coast Guard ALJ Docketing Center for adjudication pursuant to 15 U.S.C. § 1541.[1] On July 18, 2006, the Chief Administrative law Judge assigned this matter to Judge Peter A. Fitzpatrick and ordered that Preliminary Positions on Issues and Procedures (PPIPs) be submitted by August 17, 2006. On August 25, 2006, Judge Fitzpatrick granted the parties' motions to extend the time for submitting their PPIPs and ordered that PPIPs be submitted by September 29, 2006. On September 28, 2006, Respondents submitted their PPIPs and on September 29, the Agency submitted its PPIP.

---

[1] § 10, Pub.L. 105-160, 112 Stat. 27, March 6, 1998, codified at 15 U.S.C. § 1541 which reads it pertinent part, "[n]otwithstanding section 559 of Title 5, with respect to any marine resource conservation law or regulation administered by the Secretary of Commerce acting through the National Oceanic and Atmospheric Administration, all adjudicatory function which are required by chapter 5 of Title 5 to be performed by an Administrative Law Judge may be performed by the United States Coast Guard on reimbursable basis.

On October 5, 2006, the Chief Administrative Law Judge re-assigned this matter to the undersigned.[2] After a brief pre-hearing teleconference on November 7, 2006, the hearing was scheduled to commence on January 30, 2007 at U.S. Coast Guard Sector Delaware Bay, Philadelphia, Pennsylvania. On January 15, 2007, counsel for Respondents forwarded his unopposed motion to continue trial because NOAA wished to confer with Respondent, Christopher R. Loughrey, concerning the underlying facts in this case. Counsel advised that he could not continue to represent both Respondents due to an irreconcilable conflict of interest and recommended that Mr. Loughery retain the services of a veteran trial lawyer Perry DeMarco, Sr., Esquire of Philadelphia, Counsel advised further that there have been ongoing settlement negotiations; that he would like to pursue some alternatives to trial and that the additional time of 30 days would be helpful. Due to scheduling conflicts with the undersigned's hearing docket, the counsel's request for continuance was denied on January 17, 2007. On January 26, 2007, the Agency forwarded its Notice of settlement with Christopher R. Loughrey and on January 29, 2007, the undersigned removed Respondent Loughery from the hearing docket and ordered that the matter proceed to hearing on January 30, 2007 with the re

---

[2] Judge Fitzpatrick advised that he would be retiring by the end of the year.

maining Respondent, John Van Salisbury. The Order also acknowledged that the compromise civil penalty agreed to with Mr. Loughery would reduce the amount of the Agency's assessed civil penalty against Mr. Van Salisbury

PREHEARING MOTIONS

On January 29, 2007, counsel for John Van Salisbury submitted a motion entitled in part, "Pre-Hearing Issues" which raised four arguments:

1) that the Agency's total assessed civil penalties, in excess of $150,000, and its proposed 180 day permit suspension are grossly disproportional to the alleged infraction of misappropriating (5) lobsters and tampering with the Horvath's fishing gear, and that it per se constitutes a violation of the Eighth Amendment and Due Process Clause requiring fundamental fairness in the ultimate disposition of litigation matters pursued by the Government;

2) that Respondent Christopher Loughrey settled this matter for $7,500 with no admission or denial of culpability or liability on Loughrey's part and that said settlement is not evidence for or against Respondent Van Salisbury;

3) that the search and seizure conducted by armed police officers of the New Jersey State Police as well as various federal agents was unreasonable under the Fourth Amendment because the government did not obtain a search warrant; and

4) counsel moves or sequestration of all witnesses except the case agent.

RULINGS ON PREHEARING ISSUES

Prior to taking evidence at the hearing, the undersigned ruled on Respondent's Pre-Hearing Issues" as follows:

Issue number one: Denied. Respondent argues that the civil penalty and permit sanction are so excessive that they per se constitute a violation of the Eighth Amendment and the Due Process Clause of the Fifth Amendment. In support of his argument, respondent cites three cases: United States v. Bajakajian, 524 U.S. 321, 337 (1998), United States v. 3814 Thurman Street, 164 F.3d 1191 (9th Cir. 1999), and United States v. Ford, 442 F. Supp. 2d 429 (D. Mich. 2006). All three cases involve civil forfeitures of money or property that the courts found to be grossly disproportional to the gravity of the offense or defendant's actions.

In Bajakajian, the defendant's failed toe report $357,144 in currency as he was leaving the United States. This failure to report was in violation of federal law which requires individuals leaving the country to report all money in their possession in excess of $10,000. The defendant pled guilty to failure to report and the government sought to forfeit the entire $257,144. The district judge found that although he entire amount was subject to forfeiture,

he ordered only $15,000 forfeited because forfeiting the entire amount was extraordinarily harsh, grossly disproportionate to the offense, and would violate the Excessive Fines Clause of the Eighth Amendment. The Ninth Circuit affirmed as did the Supreme Court finding that "forfeitures – payments in kind – are thus 'fines' if they constitute punishment for an offense" and are thus within the meaning of the Eighth Amendment. 524 U.S. at 328. "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." Id. At 334.

The Court went on to find that the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. Bajakajian's crime was only a reporting offense and unrelated to any other offense. It was permissible to transport the currency out of the country so long as he reported it. Id at 337, 338.

In United States v. 3814 NW Thurman Street, 164 F.3d 1191 (9th Cir. 1999), the government filed an in rem forfeiture action against the property based on false statement that the owner had made on a mortgage loan application. The government argued that the property was forfeitable because it constituted or was derived from proceeds traceable to mail and wire fraud. The district court ordered the property forfeited to its full extent of $200,686.18. On appeal, the Ninth Circuit held that the forfeiture of the entire $200,686.18 was punitive and therefore exces

sive under the Eighth Amendment's Excessive Fine Clause.

In United States v. Ford Motor Company, 442 F. Supp. 2d 429 (E.D. Mich. 2006), the government filed a forfeiture action seeking $12,374,268 from the Ford Motor Company reflecting the value of parts Ford imported into the United States from Canada duty-free pursuant to the Automotive Products Trade Act of 1965 ("APTA"). While the Court held that the forfeiture pursuant to APTA was not available to the government under the facts in this case, it also held that if forfeiture were available, the forfeiture of $12M, representing the entire value of the goods diverted, was punitive and therefore subject to the Eighth Amendment's Excessive Fines Clause because the Government was seeking more than 31 times the amount of "duty" it was deprived of as a result of Ford's failure to report. 442 F. Supp.2d at 437.

While 15 C.F.R. § 904.200(b), prescribes that Administrative Law Judges have "no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA" the undersigned found the assessed civil penalties in the amount of $80,000 for each violation well within the limit of $120,000[3] pre

[3] 65 Fed. Reg. 65,262 (Nov. 1, 2000).

scribed by the Magnuson Stevens Act at the time of the violation.

Second, the proposed civil penalties of $80,000 for each violation and total permit sanctions of 180 days are within the limits prescribed by the Northeast Region Civil Administrative Penalty Schedule. For first time offenders, the Penalty Schedule provides a range from $5,000 to $80,000 for each violation and permit sanctions up to 90 days for each violation.

Third, under 15 C.F.R. § 904.108(a), "[f]actors to be taken into account in assessing a penalty . . . may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior offenses, and ability to pay; and such other matters as justice may require." The Agency's PPIP claimed that gear tampering in the respondent's fishing area has been a long standing problem that is extremely difficult to uncover and successfully prosecute. "Because of this, it has escalated tensions between lobstermen in this area to the point of reported gun fire and other violent actions. The penalties and permit sanctions assessed in this case address the serious nature of stealing catch and damaging gear that is happening between fishermen . . . . [and] are meant to punish for the act of stealing and damaging another's income producing property and to deter any type of this activity with the hope of protecting livelihoods and lives." Agency PIPP at 2. The Agency's argu

ment was further borne out by testimony at the hearing.

The alleged violations do not reflect solely the value of the fish and the fishing gear. It is what the fish and the fishing gear represent – another's income and income producing property. Civil penalties and permit sanctions must adequately address the serious nature of stealing catch and damaging gear and thus protect lives and livelihoods.

Government actions in the above-cited forfeiture cases have one thing in common -- the government is attempting to forfeit the entire amount of the property in question without any dollar amount limitations imposed by Congress and without any consideration of the nature, circumstances, extent, and gravity of the alleged violation, as well as the respondent's degree of culpability, and any history of prior offenses, ability to pay; and such other matters as justice may require, as in the instant case. However, the instant case is distinguishable from the above cases because Congress and the Agency have imposed limitations and considerations that must be taken into account when assessing civil penalties.

Issue number two: Granted. The Loughrey settlement agreed would not be used as evidence against Mr. Van Salisbury. Agency Counsel, J. Mitch MacDonald, Esquire, advised that co-Respondent Christopher R. Loughrey settled for $7,500 and that the

remaining civil penalties of $80,000 on each count would be reduced by $3,750 each, thereby leaving $76,250 of proposed civil penalties on each count for a total of $152,500. Tr. at 10, 11. Mr. MacDonald also advised that the Agency did not intend to use the Loughery settlement agreement for any reason other than to reduce the total civil penalty, Tr. at 14.

Issue number three: Denied. Respondent asserts that the search and seizure conducted by armed police officers of the New Jersey State Police as well as various federal agents was unreasonable under the Fourth Amendment because the government did not obtain a search warrant. Again, the undersigned recognized that Administrative Law Judges have "no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA" but found that it was clear Respondent was a licensed and permitted participant in a government regulated industry and that under the Magnuson-Stevens Act, federal and authorized state officers may, with or without a warrant or other process, board, search, inspect, and seize any fish in violation of any provision of the. 16 U.S.C. § 1861(b) (A) (ii) and (iv); see also, Lovgren v. Byrne, 787 F. 2d 857 (3rd Cir. 1986). Further, because additional, armed law enforcement personnel were present to ensure officer safety during the inspection due to the recent history of violence involving lobstermen in New Jersey, it does not necessarily follow that a search warrant require

ment is then triggered in an otherwise pervasively regulated industry.

Issue number four: Granted. Respondent moved for sequestration of all witnesses except the case agent. There being no objection by the Agency, the undersigned ruled to exclude witness. Tr. at 15. See Fed. R. Evid. 615.

At the close of the two day hearing on January 31, 2007, the undersigned ordered that the parties may submit proposed findings of fact and conclusions of law in accordance with 15 C.F.R. § 904.261(a). Respondent did not submit proposed findings but submitted a reply to the Agency's initial brief and a reply to its reply brief. After submission of the final reply brief on May 31, 2007, the record was closed. This matter is now ripe for decision.

DECISION

After careful review of the entire record, I find that the Agency proved by a preponderance of reliable, probative, and credible evidence that the Respondent violated the Magnuson-Stevens Act as alleged in the above referenced NOVA and NOPS.

FINDINGS OF FACT

1. At all times relevant to these proceedings, Respondent John Van Salisbury was the owner

and operator of the F/V MAJOR EXPENSE. Agency's Exhibits 2, and 3.

2. At all times relevant to these proceedings, Respondent held a valid federal vessel permit numbered 148280 for the F/V MAJOR EXPENSE in the American lobster fishery and a valid federal operator permit numbered 10005903. Agency Exhibits 2 and 4.

3. For the last 15 years, NOAA Fisheries and the New Jersey Division of Fish and Wildlife received and documented numerous complaints concerning violence, threats of violence, destruction of property, threats of lobster trap destruction, lobster trap theft and theft of lobsters from traps located in the "mud hole area." The loss of traps, as well as the corresponding theft of lobsters from those traps, caused the lobstermen to suffer economic loss. Agency Exhibit 9, page 11; Agency Exhibits 14 and 15.

4. The "mud hole" area is a trench about 12 miles off the shore of northern new Jersey, where lobstermen generally place their traps along fathom lines to take advantage of temperature differential or habitat because good habitat is located certain at fathom lines along the trench. Tr. 1, 66 to 71; Agency Exhibit 14.

5. From March 2001 through August 2004, the complaints increased in number, frequency, and level of violence. Agency Exhibit 9, page 11.

6. A large percentage of the complaints identified the Van Salisbury family boat responsible for damaging and/or stealing lobster and gear. Tr. 1 at 78.

7. From information obtained through complaints, suspect fisherman moved gear from areas of decreasing productive into areas of increasing productivity. If other fishermen were utilizing those areas, the suspect fishermen would place their fishing gear within close proximity to the previously established fishing gear. Over the course of several days, the suspect fishermen would move their gear closer and closer to the previously established gear. This would continue until the suspect fisherman's gear was immediately adjacent to the established gear. The established fishermen would the notice that his fishing gear had been tampered with or removed completely and the suspect fisherman's gear placed in the same area. Agency Exhibit 8, pages 13 and 14.

8. In April of 2004, a letter addressed to permit holders and signed by Special Agent in Charge Andrew Cohen and Commander Dale M. Jones, Chief of the U.S. Coast Guard Fifth

District was sent to permit holders, posted on the NMFS web-site, and read at Fishery Council Meetings, to warn permit holders of fishing gear conflicts in the Mud Hole area, and solicit their assistance in reporting any incidents. The letter also advised that fishing gear conflicts resulting in the use of physical violence may be referred to the U.S. Attorney's Office for prosecution and that if any party involved in the conflict engages in the use of a firearm, the penalties may be significantly increased. The letter also warned of potential civil fines and forfeitures. Agency Exhibit 15. Tr. 1 at 101, 102.

9. In August 2004, Special Agents from NOAA Fisheries and Conservation Officers from the New Jersey Division of Fish and Wildlife developed a plan to place uniquely identified lobsters, in strategic locations known for being an active fishing area based on information contained in the complaints. Agency Exhibit 9, page 12.

10. Investigators chose Charles Van Salisbury, John Van Salisbury, and Richard Van Salisbury as targets because approximately 30 to 50 percent of the complaints received by national marine Fisheries Service Special Agent Ray identified the Van Salisbury's as the lobstermen who damaged or stole other lobstermen's gear or lobster from 2002 to 2004. Tr.1

at 78, 81, and 110. Agency Exhibit 9, pages 12, 13.

11. Investigators decided to take uniquely identified lobsters, place them into lobster traps that did not belong to any of the Van Salisburys and situate those lobster traps in areas adjacent to where the van Salisbury's legally set their traps. The investigators planned to place the oobsters in the traps at night and board and inspect the Van Salisburys' vessels the following day when they returned to port. Tr. 1 at 110, 111. Agency Exhibit 9.

12. Joseph Horvath, Sr. and his sons, Adam Horvath and Joseph P. Horvath, Jr., were chosen as cooperating witnesses to the investigation because investigators never received complains about them tampering with anyone's gear. Further, they were the ones who provided the majority of the complaints against the Van Salisburys. No other lobstermen were willing to cooperate because they were afraid of retribution by the Van Salisburys. In addition, the investigators did not have the equipment to put the operation together and need a vessel such as the Harvaths' BABY DOLL which was capable of traveling to the "mud hole" and pulling large quantities of lobster pots from relatively deep water. Most importantly, the Horvaths were willing to cooperate. Tr. 1 at 251, 252,327,

328, 329; Tr. 2 at 10, 11. Agency Exhibit 9, page 13.

13. At all times relevant to these proceedings, Joseph P. Horvath, Sr.'s sons, Joseph P. Horvath, Jr. and Adam Horvath, owned the F/V BABY DOLL. Agency Exhibit 6.

14. At all times relevant to these proceedings, the F/V BABY DOLL had a valid federal vessel permit numbered 230241 for the American lobster fishery, among others. Agency Exhibit 5.

15. At all times relevant to these proceedings, Joseph P. Horvath, Sr. held a valid federal operator permit numbered 10009474. Agency Exhibit 7.

16. On Monday, September 20, 2004, New Jersey Conservation Officers Gary Fittin and Adam Sennick marked 40 American lobsters, some with unique identifiers and some with standard identifiers. Transponders were attached to five (5) of the lobsters which were identified by a unique serial number that a receiver could locate and identify. Agency Exhibits 9, 16, and 17.

17. At approximately 10:29 p.m. on September 20, 2004, New Jersey Conservation Officers Fittin and Lt. Mark Chicketano boarded the F/V BABY DOLL at the dock located at LORAN C

Time Differentials 26957.1/43547.8 and set sail to a location identified by LORAN C Time Differentials as 26848.6/43556.9, which is in the "Mud Hole" area in the Exclusive Economic Zone (EEZ). Agency Exhibits 9, 17, and 18.

18. LORAN C Time Differentials or TDs are radio waves, measured in micro seconds, and are represented as a number sequence of five, whole integers and several decimal places. Lobster fishermen do not typically record the first two whole integers of the TD number sequence because these digits remain constant over a large geographic area. Therefore, lobster fishermen record the TDs out to the first decimal place. This fraction of a TD greatly increases the repeatable accuracy of a given LORAN C receiver so lobster fishermen use the TDs due to their repeatable accuracy so they can locate their traps. Agency Exhibit 9, 36, and 37.

19. At approximately 12:23 a.m. on September 21, 2004, Officer Fittin and Lt. Chicketano arrived at 26848.6/43556.9 and hauled up 11 lobster pots owned by Joseph Horvath, jr. and Adam Horvath and known as line number 33. This position is in the Mud Hole area within the EEZ and where Mr. Horvath had experienced numerous pot losses. Line 33 hard a marker or high flyer, consisting of orange and

black flags, attached to a white square Styrofoam float with the number "33" spray painted on all four sides. Agency Exhibits 14, 17, 18, and 20. Tr. 1 at 131, 133.

20. Adam Horvath tied together the parlor funnels in each of line 33's 11 traps with 6 pound test monofilament line to ensure that a legal-sized lobster could not escape through any parlor vent opening. In addition, he forced each lobster against the pot's parlor vents to make certain that it could not possibly escape. Agency Exhibits, 17, 18, and 21 A-C.

21. Trap #1 (the trap tied to the trawl's buoy) of line 33 was seeded with two uniquely identified lobsters. One lobster had transponder #43213E6128 attached to it and the other had a unique identifier. Traps 2-9 each contained one lobster with unique identifiers. Trap 10 contained a lobster with a standard identifier. Trap 11 contained two uniquely identified lobsters with one having transponder #432706054F affixed. Each trap was inspected to ensure that it was labeled in accordance with NOAA Fisheries regulations and as belonging to Horvath. Each trap had an orange tag, printed with Horvath and the number 230241, BABY DOLL'S federal lobster permit number attached. In addition, a National Marine Fisheries Service lobster area management tag, printed with the federal lobster

permit number (230241), was attached to each trap in accordance with federal requirements. Agency Exhibits 9, page 16; Agency Exhibits 10, 17, and 20.

22. At 1:06 a.m. on September 21, 2004, Joseph Horvath, jr. reset line 33 at the same location from which it was pulled and was identified by LORAN C TD's 26848.5/43556.9. This line ran parallel to a line set by John Van Salisbury, as identified by Salisbury's unique markers. Trawl number 33 and its traps were reset at the same location from which it was hauled. Horvath used the Loran C receiver and his logbook to establish the correct beginning and ending TDs to reset line 33. Agency Exhibits 9, 10, 12, and 17.

23. At 1:16 a.m. on September 21, 2004, at the location identified by LORAN C TD's as 26845.8/43551.8, a second trawl of 11 pots belonging to Joseph and Adam Horvath and known as line 32 was hauled up. This location is also in the Mud Hole area of the EEZ. The pots were also secured so that legal-sized lobsters could not escape from any parlor vent openings. Each pot was seeded with a uniquely or standard identified lobster (with one of the lobsters having affixed a transponder with a serial #431F074143), and reset at approximately 1:50 a.m. at the same location from which they were hauled up. The re

set line ran parallel to a line set by Charles Van Salisbury, Jr. Agency Exhibits 9, 14, 17, 20, and 21 A-C. Tr. 1 at 13, 14, 133.

24. At approximately 2:00 a.m. on September 21, 2004, at the location identified by LORAN C TD's as 26843.9/43549.0, a third trawl comprised of 15 pots belonging to Joseph and Adam Horvath and known as line #45 was hauled up. This location is also in the Mud Hole area of the EEZ. The pots were also secured so that legal-sized lobsters could not escape from any parlor vent openings. Each pot except one (pot # 14) was seeded with a uniquely or standard identified lobster (with two of the lobsters having each affixed a transponder, one with serial #431D133932 and the other with serial #4326676707), and reset at approximately 2:48 a.m. at the same location from which they were hauled up. Agency Exhibits 9, 10, 14, 17, 18, 20, and 21 A, B, and C; Tr. 1 at 131, 133.

25. During the time period when the lobsters were being seeded into the Horvath's traps, no other fishing vessels were seen near the location of the seeded traps. Tr. 1 at 291, 329; Tr. 2 at 11, 52.

26. However, on the way back to port, Lt. Chicketano and Joseph Horvath, Sr. testified that he saw an unidentified vessel as they ap

proach port, after the lobster seeding operation. Tr. 1 at 329, 331; Tr. 2 at 12, 13, 14.

27. The F/V BABY DOLL then left the Mud Hole area at approximately 2:48 a.m. and headed back to the Shark River area from which they set sail, arriving there at approximately 4:11 a.m. on September 21, 2004. Agency Exhibits 17 and 18.

28. Lt. Chicketano instructed Joseph Horvath, Sr., Joseph Horvath, jr., and Adam Horvath not to leave shore for the rest of that day and until the investigation concluded. Agency Exhibits 9, 7, and 18; Tr.1 at 339, 342.

29. Joseph Horvath, Sr. and Adam Horvath proceeded directly from their vessel at the dock to their homes, where they stayed until approximately 1:30 to 2 p.m. when they left to attend an appointment with their attorney. Agency Exhibit 29; Tr. 2 at 15, 16, 54, and 55.

30. Joseph Horvath, Jr. was home at the residence of Joseph Horvath, Sr. during the time that the lobsters were being seeded into the traps and did not proceed to the Mud Hole area until he accompanied the New Jersey Fish and Wildlife Conservation Officers on September 22, 2004. Tr. 2 at 83.

31. After the lobster pots were seeded with the uniquely and standard identified lobsters, nei

ther Joseph Horvath, Sr., Joseph Horvath, Jr., nor Adam Horvath, or anyone on their behalf, went back to the seeded lobster traps until authorized by the New Jersey Conservation officers. Agency Exhibit 29; Tr. 2 at 20, 21, 55, 56, 76, 84, 96, 97, 99, and 100.

32. At 3:30 a.m. on September 21, 2004, Charles Van Salisbury left port on the F/V SPIRT en route to the Mud Hole area to engage in lobster fishing. The F/V SPIRIT likely arrived at the Mud Hole area at around 4:15 a.m. to 4:30 a.m. Agency Exhibit 28; Tr. 2 at 151.

33. At 4:30 a.m. on September 21, 2004, John Van Salisbury left port on the F/V MAJOR EXPENSE enroute to the Mud Hole area to engage in lobster fishing. Agency Exhibit 28; Tr. 2 at 151.

34. At 7:00 a.m. on September 21, 2004, Richard Van Salisbury left port on the F/V SEA BREEZE en route to the Mud Hole area to engage in lobster fishing. Agency Exhibit 28.

35. At 5:15 p.m. on September 21, 2004, federally deputized New Jersey Fish and Wildlife Conservation Officers inspected the F/V MAJOR EXPENSE's catch at the dock located in Point Pleasant, N.J. Agency Exhibits 9, 10, 16, 17, and 18

36. The inspection of the F/V MAJOR EXPENSE's catch uncovered 5 of the 13 lobsters that were seeded in line 33, including the uniquely identified lobsters with the serial numbers #43213E6128 and #43270606F and uniquely identified lobsters from traps 1, 4, 5, 8, and 13. Agency Exhibit 9, pages 23-24; Agency Exhibit 18; Tr. 1 at 152.

37. When apprised of being caught with the 5 uniquely identified lobsters, John Van Salisbury first expressed surprise that the authorized officers put so much effort into catching him. Second, he stated that "you don't know that much about lobsters, do you? Don't you know that lobsters go in and out of traps all the time?" Agency Exhibit 18, page 3; Tr. 1 at 348; Tr. 2 at 195, 196.

38. The following day, September 22, 2004, National Marine Fisheries Service Special Agent Jeff Ray and New Jersey Conservation Officer Dravis accompanied Horvath, Jr. and Adam Horvath to the location of line 33. Agency Exhibit 9, page 26.

39. Line 33 was gone. It had been stolen, damaged, tampered with, or removed. In its place, beginning at the place where one of line 33's buoys was formerly set, was a line of lobster gear that belonged to John Van Salisbury. Agency Exhibit 9, page 26; Tr. 1 at 154, 157.

40. Lines 32 and 45 were in the same location in which they were placed by the authorized officers on early September 21, 2004. When the lines were hauled up, it was determined that 19 of the 27 marked lobsters in lines 32 and 45 had died. Agency Exhibits 9 and 10.

41. The percentage of total lobster that died in lines 32 and 45 is consistent with the percentage of lobsters from line 33 that were not discovered in John Van Salisbury's catch. It is most likely that the remaining 8 of the 13 lobsters in line 33 had died and were not retrieved by John Van Salisbury because they were dead. Agency Exhibits 9 and 10, Tr. 1 at 160, 162, 192, and 193.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The respondent, John Van Salisbury, is a person within the meaning of the Act, 16 U.S.C. § 1802(31).

2. John Van Salisbury stole 5 American lobster from Joseph Horvath, Jr.'s and Adam Horvath's lobster traps that were located in the EEZ in violation of 16 U.S.C. § 1857(1)(K)(ii).

3. John Van Salisbury intentionally or negligently, and without authorization, removed,

damaged, or tampered with lobster traps set in the EEZ that were

4. owned by Adam Horvath and Joseph Horvath, jr. in violation of 16 U.S.C. § 1857(1)(K)(i).

5. The civil penalties and sanction assessed in this action reflect the serious nature, circumstances, extent, and gravity of the alleged violation as well as the Respondent's degree of culpability.

6. The respondent entered no evidence about his ability to pay the assessed penalty.

7. Respondent Christopher R. Loughrey's settlement with the Agency reduced the total civil penalties from $160,000 to $152,500.

OPINION

The Agency must prove the violations alleged in the NOVA by a preponderance of the evidence. 5 U.S.C. § 556(d); Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (1981); In the Matter of Cunog Vo, 2001 WL 1085351 (NOAA 2001). Preponderance of the evidence is proved when the agency illustrates, through evidence presented in the record that it is more likely than not the respondent committed the violation alleged in the NOVA. In the Matter of John Fernandez, III, 1999 WL 1417462 (NOAA 1999). Direct and circumstantial evidence may be relied upon to satisfy the burden of

proof. In the Matter of Cunog Vo, 2001 WL 1085351 (NOAA 2001). The burden of production to rebut agency evidence shifts to the respondent after NOAA proves the allegations contained in the NOVA by a preponderance of reliable, probative and substantial evidence. Id.

The Magnuson Stevens Act was enacted to protect, conserve, and manage the fishery resources of the United States and its adjacent waters. 16 U.S.C. § 1801(b)(1)(A). To achieve this purpose, the Secretary of the Department of Commerce may asses civil penalties and/or impose permit sanctions against any person who violates the Magnuson-Stevens Act. 16 U.S.C. § 1858; In the Matter of Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998).

As noted in the above factual findings, it is undisputed that uniquely identified lobsters were placed in the Horvaths' traps located in the Mud Hole area only several hours prior to Respondent as his brothers getting underway to fish for lobsters in the same area. Later that day, those uniquely identified lobsters were found in Respondent's possession. When confronted about lobsters that were previously planted in the Horvaths' traps, Respondent stated that he could not believe that the law enforcement officers would put so much effort into catching him. Agency Exhibit 18, page 3.

Respondent suggests that the uniquely identified lobsters were found in Respondent's possession be

cause one or more of the Horvaths probably went back out to the Mud Hole, retrieved the seeded marked lobsters from their traps, and then placed them in Respondent's traps. Tr. 1, pages 43-49, Respondent's Initial Response Brief at 2—4 and Respondent's Reply Brief at 2. However, the administrative record contains no evidence of such an occurrence. Respondent presents only an argument that given the history of acrimony between these two families, that alone was enough to provide the Horvaths with the motivation to illegally tamper with the law enforcement operation to seek retribution against the Van Salisburys. I find otherwise. As shown in findings of fact 30 and 31, the Horvaths all credibly testified that they did not go out to the Mud Hole on September 21, 2004, after their traps were seeded. Tr. 2 at 20, 21, 55, 56, 76, 84, 96, 97, 99, and 100. I reject Respondent's theory because it is not supported by any evidence. Further, I find the Horvaths' testimony credible and the Respondent's testimony not credible.

SANCTION

At the time of the alleged violations, 16 U.S.C. § 1858(a), provided for assessment of a civil penalty for each violation not to exceed $120,000. 15 C.F.R. § 6.4 ; See 65 Fed. Reg. 65,262 (Nov. 1, 200). Under 15 C.F.R. § 904.108(a), "[f]actors to be taken into account in assessing a penalty . . . may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpabil

ity, any history of prior offenses, and ability to pay; and such other matters as justice may require." This investigation and the resulting administrative enforcement proceeding was initiated to address the recurring thefts of lobsters and gear as well as gear tampering occurring in the EEZ off the New Jersey coast, specifically in the Mud Hole area. For over 15 years, law enforcement authorities have received reports of recurring conflicts with some resulting in violence. The loss of traps, as well as the corresponding theft of lobsters from those traps, has also caused the lobstermen to suffer economic loss. From March 2001 through August 2004, the complaints increased. In April 2004 NOAA Fisheries and the Coast Guard issued a letter to all Federal lobster permit holders in the area advising that NOAA and the Coat Guard took all complains seriously. The letter encouraged lobstermen to report fishing gear conflicts and reminded them of the penalties.

The value of the 5 lobster and traps is only a small factor when considering the value of resources associated with this investigate in a hostile and volatile climate. Further, Respondent's acts were not accidental or unintentional. Having previously been cited in 1995 for removing lobster traps from the EEZ without authorization, he was acutely aware of the proscriptions concerning fishing gear and lobsters, yet he chose to violate the law again. Agency Exhibit 30. The Agency's total assessed civil penalties in the amount of $152,500 and the 180 day sanc

tion are appropriate for first time offenders under the Northeast Region Civil Administrative Penalty Schedule.

ORDER

IT IS HEREBY ORDERED that Counts 1 and 2 of the Notice of Violation and Assessment of Administrative Penalty against John Van Salisbury are **PROVED**. A Civil penalty in the amount of **One hundred fifty two thousand five hundred dollars $152,500 is ASSESSED.**

IT IF FURTHER ORDERED that Counts 1 and 2 of the Notice of the Permit Sanction against vessel number 148820 and operator permit number 10005903 are proved. Vessel permit number 148820 and operator permit number10005903 are hereby **suspended for a period of 180 days.**

ANY PARTY may petition the Administrator of the National Oceanic and Atmospheric Administration for administrative review of this decision. The petition must be filed within thirty (30) days from the date of this Initial Decision as provided in 15 C.F.R. § 904.273, **Attachment A**. Copies of the petition shall also be sent to the undersigned judge, the Coast Guard ALJ Docketing Center, and NOAA counsel. If neither party seeks administrative review within 30 days after issuance of this Order, the Initial Decision will become the final decision of the Agency.

Done and dates June 13, 2007

New York, New York

/s/WalterJ. Bruzinski/s/

Walter J. Brudzinksi
Administrative Law Judge
U.S. Coast Guard

ATTACHMENT A

NOTICE OF APPEAL RIGHTS

15 C.F.R. § 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision 30 days after the date the decision is served. The petitioner shall be addressed to the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue NW, Washington, DC 20230. Copies of the petitioner for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel fore Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of fats relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statues, regulations, and principal authorities. Pe

titions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of al cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must

comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petitioner within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective days 150 days after the petition is served

(i) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be brief and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrators grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written

decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

(l) An initial decision shall not be subject to judicial review unless:

The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or re

manded y a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrators on any issues the Administrator deems appropriate.

ATTACHMENT B

WITNESS AND EXHIBIT LISTS

WITNESS LIST

AGENCY'S WITNESSES

1. Special Agent Jeffrey Ray, NOAA Fisheries Enforcement
2. Conservation Officer Gary Fittin, New Jersey Division of Fish and Wildlife
3. Conservation Officer, Adam Terrence Sennick, New Jersey Division of Fish and Wildlife
4. Lieutenant Mark Chicketano, New Jersey Division of Fish and Wildlife
5. Joseph Horvath, Sr.
6. Adam Horvath
7. Joseph Horvath, Jr.

RESPONDENT'S WITNESSES

1. Charles Van Salisbury
2. Tracey Van Salisbury
3. Richard Van Salisbury
4. John Van Salisbury

EXHIBIT LIST

AGENCY'S EXHIBITS

Agency Ex. 1 Curriculum Vitae, Special Agent Jeffrey J. ray, NOAA Fisheries Office of Law Enforcement, 2 pages

Agency Ex. 2 Federal Fisheries Permit 148280, F/V MAJOR EXPENSE, NJ0746GN, issued to John Van Salisbury, 3 pages

Agency Ex. 3 new Jersey Motor Vehicle Services Boat Registration NJ 0746GN and Certificate of Title for HIN 3 NJZ40986HUIL, 2 pages

Agency Ex. 4 Renewal Application for Commercial Operator Permit No. 10005903 dated 10 May 1005, 1 page

Agency Ex. 5 Federal Fisheries Permit 230241, F/V BABY DOLL, Official No. 53904 issued to Joseph P. Horvath, Jr., 1 page

Agency Ex. 6 Certificate of Documentation, F/V BABY DOLL, Official No. 53904 showing Owners Joseph Horvath, Jr. and Adam Horvath, 1 page

Agency Ex. 7 Renewal Application for Commercial Vessel Operator Permit for Joseph P. Horvath, #1000474, 1996 1998 2001, 2004, and Joseph P. Horvath, Jr., #10009473, 1996, 1998, 2001, 2004, 8 pages total

Agency Ex. 8 Enforcement Action reports for NE043090 dated 9/24/04 for John Van Salisbury and Christopher R. Loughrey, charging "remove fishing gear owned by another" and "stole fish from another," two pages

Agency Ex. 9 Offense Investigation Report dated October 18, 2004 for the F/V MAJOR EXPENSE and John Van Salisbury, 37 pages

Agency Ex. 10 Supplement too Offense Investigative Report, 9 pages

Agency Ex. 11 Memorandum of S/A Jeffrey Ray's interview with John Van Salisbury of October 6, 2004, 2 pages

Agency Ex. 12 Drawing of Typical Lobster Trawl Configuration, 1 page

Agency Ex. 13 Drawing of Typical Lobster Trap, 1 page

Agency Ex. 14 Enlarged photocopy of affected area on NOAA Chart 12300 showing location of Horvath lines 32, 33, and 45, together with Loran C coordinates, 2 pages

Agency Ex. 15 Coast Guard undated letter 5800 issued in April 2004 to permit holders advising that there has been an increase in conflicts involving the destruction of fixed fishing gear and in violence around the Mud Hole fishing area (in the EEZ) off the coast of New Jersey

Agency Ex. 16 Operation Report dated 9/21/04 prepared by NJ Conservation Officer Adam T. Semnick, detailing action taken on September 20th and the 21st regarding the lobster seeding operation and discovering the seeded lobsters on Respondent's boat, 2 pages

Agency Ex. 17 Operation Report dated 9/21/04 prepared by NJ Conservation Officer Gary Fittin, detailing the lobster seeding operations on 9/20/04 and 9/21/04, 5 pages

Agency Ex. 18 Operation Report dated 9/21/04 prepared by NJ Conservation Officer Lt. Mark Chicketano, detailing the lobster seeding operations on 9/20/04 and 921/04, 4 pages

Agency Ex. 19 Street map of Monmouth County, New Jersey where the Shark River empties into the Atlantic Ocean, 1 page

Agency Ex. 20 Photocopy of National Marine Fisheries Service required identification tags fastened to the Horvath traps (230241 345 o427 NMFS 04), 1 page

Agency Ex. 21A Photograph of secured trap funnel opening showing constriction, 1 page

Agency Ex. 21B Photograph of secured trap funnel, overhead view, showing where lobster enters trap, 1 page

Agency Ex. 21C Photograph of secured trap funnel showing the section of the trap in which lobsters are contained after they have been trapped, 1 page

Agency Ex. 22 Photograph of lobster trap vent, 1 page

Agency Ex. 23 Photography of2 lobster traps, one on top of another, showing entrances on the right and vents on the left, 1 page

Agency Ex. 24 Photograph of fish tote used in the lobster industry in New Jersey similar to the one responded used in his lobster catch, also photograph of fish totes on F/V MAJOR EXPENSE which contained the recovered , uniquely identified lobsters, 2 pages

Agency Ex. 25 Photograph of five uniquely identified lobsters recovered from Respondent's catch, 1 page

Agency Ex. 26 Northeast Region Civil Administrative Penalty Schedule, 1 page

Agency Ex. 27 Copy of Magnuson-Steven Fishery Conservation and Management Act of October 11, 19996, 121 pages

Agency Ex. 28 Fishing Vessel Trip Report for the F/V SPIRIT dated 9/21/04; Fishing Vessel Trip Report for the F/V MAJOR EXPENSE dated 9/22/04, and Fishing Vessel Trip Report for the F/V SEA BREEZE dated 9/21/04, 3 pages

Agency Ex. 29 Hobbie, Corrigan, Bertucio, & Tashy, P.C. Attorneys at Law letter dated December 11, 2006 showing that the firm had a meeting client Joseph Horvath, Sr. on September 21, 2004, among other things, 2 pages

Agency Ex. 30 Notice of Permit Sanction, Notice of Violation and Assessment of Administrative Penalty, issued to John Van Salisbury in case no. NE950003FM/V dated September 13, 1995, alleging that on December 28, 1994, Mr. Van Salisbury was accused of removing fishing gear owned by other persons from the EEZ without authorization, in violation of 15 U.S.C. § 1857(1)(K)(i); also contained in this exhibit are covered letters and an executed settlement agreement, 10 pages

RESPONDENT'S EXHIBITS

None

ATTACHMENT C

RULINGS ON PROPOSED FINDINGS OF FACT / CONCLUSIONS OF LAW

AGENCY'S PROPOSED FINDINGS OF FACT

1. At all relevant times, John Van Salisbury owned the F/V MAJOR EXPENSE. A-2 and 3.

ACCEPTED AND INCORPORATED

2. At all relevant times, John Van Salisbury was issued and held a valid federal vessel permit numbered 14820 for the F/V MAJOR EXPENSE in the American lobster fishery[4]. A-2.

ACCEPTED AND INCORPORATED

3. At all relevant times, John Van Salisbury was issued and held a valid federal operator permit numbered 10005903. A-4.

ACCEPTED AND INCORPORATED

4. At all relevant times, the F/V BABY DOLL was owned by Joseph P. Horvath, jr. and Adam Horvath. A-6.

ACCEPTED AND INCORPORATED

---

[4] The vessel was issued a federal permit in the monkfish, skate, and general category scallop fisheries. A-2.

5. At all relevant times, a valid federal vessel permit numbered 230241 was issued for the F/V BABY DOLL in the American lobster fishery.[3] A-5.

ACCEPTED AND INCORPORATED

6. At all relevant times, Joseph P. Horvath, Sr. was issued and held a valid federal operator permit numbered 10009474. A-7.

ACCEPTED AND INCORPORATED

7. At all relevant times, Adam Horvath was issued and held a valid federal operator permit numbered 10009473. A-7.

ACCEPTED AND INCORPORATED

8. For the last 15 years, NOAA Fisheries and the NJ Division of Fish and Wildlife received and documented numerous complaints of the destruction of and theft of lobster traps and lobster from lobster traps in and around a fishing area known as the "Mud Hole." A-9, p. 11, A-14 and 15.

ACCEPTED AND INCORPORATED

9. In April of 2004, a permit holder letter written by Special Agent in Charge Andrew Cohen and Commander Dale M. Jones, Chief of the U.S. Coast Guard 5th District was sent to permit holders via

[3] The vessel was issued a federal permit in the general category scallop fishery. A-5.

email, posted on the NMFS web site, and read at Fishery Council Meetings, to warn permit holders fishing in the Mud Hole area about increased "fishing gear conflicts and to request [their] assistance in reporting any incidents." The letter also notified the permit holders of potential civil fines or forfeitures. A-15; Transcript, Volume 1, page 101, line 1 through page 102, line 4 (hereinafter T1-101:1-102:4).

ACCEPTED AND INCORPORATED

10. Charles Van Salisbury, John Van Salisbury, and Richard Van Salisbury were chosen as investigative targets because approximately 50% of the complaints received by Special Agent ray identified the Van Salisbury's as lobstermen who damaged or stole other lobstermen's gear or lobster. T1-78:16-22; 81:22-24; and 110:6-14.

ACCEPTED AND INCORPORATED

11. Joseph Horvath, Sr., Joseph Horvath, Jr., and Adam Horvath were chosen as cooperating witnesses to the investigation because their gear was suspected of being targeted by the Van Salisbury's and other lobstermen were afraid to come forward against the Van Salisbury's. T1-114:2-115:4; 251:21-252:10; and 327:14-329:4; and Transcript Volume 2 (T2) T2-10:16-11:9.

ACCEPTED AND INCORPORATED

12. On Monday, September 20, 2004, NJ Conservative Officers Gary Fittin and Adam Sennick marked 40 American lobsters with unique or standard identifiers. Five of the lobsters were affixed with a transponder each of which was identifiable by a unique serial number and which could be located and identified by a receiver. A-9, 16, and 17.

ACCEPTED AND INCORPORATED

13. At approximately 10:29 p.m. on September 20, 2004, NJ Conservation Officer Fittin and Lt. Mark Chicketano boarded the F/V BABY DOLL at the dock located at LORAN C TD 26957.1/43547.8 and set sail to a location identified by LORAN C TD's as 26848.6/43556.9, which is in the Mud Hole area in the Exclusive Economic Zone (EEZ). A-9, 17, and 18.

ACCEPTED AND INCORPORATED

14. At approximately 12:24 a.m. on September 21, 2004, Officer Fittin and Lt. Chicketano arrived at 26848.6/43556.9 and hauled up 11 lobster pots that were owned by Joseph Horvath, Jr. and Adam Horvath and known as line number 33. This position is located in the Mud Hole area within the EEZ. A-14, 17, 18, and 20. T1-131.14-133.21.

ACCEPTED AND INCORPORATED

15. Adam Horvath tied together the parlor funnels in each of line #33's 11 traps with 6 pound test monofilament line and ensured that a legal-sized lobster could not escape through any parlor vent opening. A-17, 18, and 21 A-C.

ACCEPTED AND INCORPORATED

16. Trap 1 (the trap tied to the trawl's buoy) of line #33 was seeded with one lobster on which had been placed a unique identifier and in which transponder #43213E6128 was affixed and another lobster on which had been placed a unique identifier. Traps 2-9 each contained one lobster on which had been placed unique indentifiers. Trap 10 contained a lobster on which had been placed a standard identifier. Trap 11 contained one lobster on which had been placed a unique identifier and in which had been placed transponder #43270066064F. A-9, 10, and 17.

ACCEPTED AND INCORPORATED

17. At approximately 1:06 a.m. on September 21, 2004, line 33 was reset at the same location from which it was pulled and was identified by LORAN C TD'S 26848.6/43556.9. This line ran parallel to a line set by John Van Salisbury. A-9, 10, and 17.

ACCEPTED AND INCORPORATED

18. At approximately 1:16 a.m. on September 21, 2004, at the location identified by LORAN C TD's as 26845.8/43551.8, a second trawl of 11 pots belonging to Joseph and Adam Horvath and known as line #32 was hauled up. This location is in the Mud Hole area of the EEZ. These pots were also secured so that legal-sized lobsters could not escape from any parlor vent openings, each pot was seeded with a uniquely or standard identified lobster (with one of the lobster having affixed a transponder with a serial #431F0D7413), and reset at approximately 1:50 a.m. at the same location from which they were hauled up. A-14, 17, 20, and 21 A-C. T1-131:14-133:21.

ACCEPTED AND INCORPORATED

19. At approximately 2:00 a.m. on September 21, 2004, at the location identified by LORAN C TD's as 26843.9/43549.0, a third trawl of 15 pots belonging to Joseph and Adam Horvath and known as line #45 was hauled up. This location is in the Mud Hole area of the EEZ. These pots were also secured so that legal-sized lobsters could not escape from any parlor vent openings, each pot except one (pot #14) was seeded with a uniquely or standard identified lobster (with two of the lobsters having each affixed a transponder, one with serial #431D133932 and the other with serial #43266776707), and reset at approximately 2:48 a.m. at the same location from which they were hauled up. A-14, 17, 20, and 21 A-C. T1-131:14-133:21.

ACCEPTED AND INCORPORATED

20. At all times during which the lobsters were being seeded into the Horvath's traps, no other fishing vessels were seen near the location of the seeded traps. T1-291:16-21 and 329:5-16, and T2-11:16-20 and 52:10-14.

ACCEPTED AND INCORPORATED

21. The F/V BABY DOLL then left the Mud Hole area at approximately 2:48 a.m. and headed back to the Shark River area from which they set sail, arriving there at approximately 4:11 a.m. A-17 and 18.

ACCEPTED AND INCORPORATED

22. Lt. Chicketano instructed Joseph Horvath, Sr., Joseph Horvath, Jr., and Adam Horvath not to leave shore for the rest of that day and until the investigation concluded. A-17 and 18; T1-339:1-342:1.

ACCEPTED AND INCORPORATED

23. Joseph Horvath, Sr. and Adam Horvath proceeded directly from their vessel at the dock to their homes, where they stayed until approximately 1:30 to 2 p.m. when they left to attend an appointment with their attorney. A-29 and T2-15:22-16:2 and 54:24-55:18.

ACCEPTED AND INCORPORATED

24. Joseph Horvath, Jr. was home at the residence of Joseph Horvath, Sr. during the time that the lobsters were being seeded into the traps and did not proceed to the Mud Hole area until he accompanied the NJ Conservation and Wildlife Officers on September 22, 2004. T2-83:4-24.

ACCEPTED AND INCORPORATED

25. After the lobster pots were sealed with the uniquely and standard identified lobsters, neither Joseph Horvath, Sr., Joseph Horvath, Jr., nor Adam Horvath, nor anyone on their behalf, went back to the seeded lobster traps until authorized by the NJ Conservation officers. A-29 and T2-20:14-23;21:17-24; 55:19-56:11; 76:2-9; 84:9-24; 96:23-97:2; 99:8-11; and 100:14-24.

ACCEPTED AND INCORPORATED

26. At 3:30 a.m. on September 21, 2004, Charles Van Salisbury left port on the F/V SPIRIT and headed to the Mud Hole area to engage in lobster fishing. The F/V SPIRIT likely arrived at the Mud Hole area at around 4:15 a.m. to 4:30 a.m. A-28; T1-137:16-21.

ACCEPTED AND INCORPORATED

27. At 4:30 a.m. on September 21, 2004, John Van Salisbury left port on the F/V MAJOR EXPENSE and headed to the Mud Hole area to engage in lobster

fishing. The F/V MAJOR EXPENSE. A-28; T2-151:2-7.

ACCEPTED AND INCORPORATED

28. At 7:00 a.m. on September 21, 2004, Richard Van Salisbury left port on the F/V SEA BREEZE and headed to the Mud Hole area to engage in lobster fishing. A-28.

ACCEPTED AND INCORPORATED

29. At 5:15 p.m. on September 21, 2004, the F/V MAJOR EXPENSE's catch was inspected by federally deputized NJ Conservation Officers at the dock located in Point Pleasant, NJ. A-9; 10; 16, 17, and 18.

ACCEPTED AND INCORPORATED

30. The inspection of the F/V MAJOR EXPENSE's catch uncovered 5 of the 13 lobsters that were seeded in line 33, including the uniquely identified lobsters with the serial numbers #43213E6128 and #432706064F and uniquely identified lobsters from traps 1, 4, 5, 8, and 13. A-9, pp. 23-24; A-18; and T1 152:8-20.

ACCEPTED AND INCORPORATED

31. When apprised of being caught with the 5 uniquely identified lobsters, John Van Salisbury first expressed surprise that the authorized officers put so much effort into catching him. Second, he stated

that "you don't know that much about lobsters, do you? Don't you know that lobsters go in and out of traps all the time?" A-18, p. 3, and T1-348:22-24 and T2-195:22-196:7.

ACCEPTED AND INCORPORATED

32. The following day, September 22, 2004, NMFS Agent Jeff Ray and NJ Conservation Officer Dravis accompanied Joseph Horvath, Jr. and Adam Horvath and proceeded to the location of line 33. A-9, p. 26.

ACCEPTED AND INCORPORATED

33. Line 33 was gone. It had been stolen, damaged, tampered with, or removed. In its place, beginning at the place where one of line 33's buoys was formerly set, was a line of lobster gear that belonged to John Van Salisbury. A-9, p. 26. T1-154:9-13; and 154:24-157:3.

ACCEPTED AND INCORPORATED

34. Lines 32 and 45 were in the same location in which they were placed by the authorized officers on early September 21, 2004. When the lines were hauled up, it was determined that 19 of the 27 marked lobsters in lines 32 and 45 had died. A-9 and 10.[6]

---

[6] The "identified Lobster Dead" column in the Table 1 of Agent Ray's Supplemental Report (Agency's Exhibit 10

ACCEPTED AND INCORPORATED

35. The percentage of total lobster that died in lines 32 and 45 I consistent with the percentage of lobsters from line 33 that were not discovered in John Van Salisbury's catch. It is most likely that the remainmg 8 of the 13 lobsters in line dead. A-9 and 10; T0160:10-162:13, and 192:14-193:13.[7]

---

states that 9 identified lobster in Line 45 were dead when retrieved. This would increase to 20 the total number of seeded lobsters found dead in lines 32 and 45, rather than the 19 indicated on page 28 of Agency's Exhibit 9. Agent Ray testified that out of the 27 seeded lobsters in line 32 and 45, the lobster planted in trap 13 of line 45 could not positively be determined to have died because it was not found and that the identified dead lobster referred to a sub-legal sized lobster part. T1-177:12-178:12. This explanation conflicts, however, with Agent Ray's earlier testimony about being able to account for all of the seeded lobster in that trap. T1-158:6-160:9. While, this discrepancy cannot be explained without further testimony from Agent Ray, the Agency holds that it is immaterial. Lines 32 and 45 are not alleged to have been tampered with and were overwhelmingly accounted for. Moreover, the number of seeded lobsters accounted for was available for cross-examination and was the subject of very limited cross-examination. T1-247:20-248:5.

[7] Whether it was 19 or 20 dead lobsters out of the 27 does not change Agent Ray's testimony comparing the percentage of total dead lobsters found in lines 32, 33 and 45

ACCEPTED AND INCORPORATED

AGENCY'S PROPOSED CONCLUSIONS OF LAW

1. The respondent, John Van Salisbury, is a person within the meaning of the Act, 16 U.S.C. § 1802(31). Agency Exhibit numbers 2 and 4 (hereinafter "A-2 and 4")

ACCEPTED AND INCORPORATED

2. John Van Salisbury stole 5 American lobster from Joseph Horvath, Jr.'s and Adam Horvath's lob

---

and the conclusions he drew from those percentages (19 of the 27 lobsters equals 70% whereas 20 of the 27 lobsters is equal to 74%). When referring to the percentage of the seeded lobsters found dead was calculable from the retrieved lobsters. Agent Ray testified that "between 60 and 75% of the [seeded] lobsters had died." Tr. 162:8-13 (brackets added to clarify the testimonial reference). The percentage of total dead lobsters is consistent with his estimate. It is also consistent with his testimony about the stressful conditions faced by the lobsters and why they would have died. Indeed, based on the stress factors noted in his testimony, it is likely more lobsters would have died in traps 32 and 45 because the lobsters were stuck inside the lobster traps for the additional day it took for the agents to get back to the trap locations to survey the results of their investigation.

ster traps that were located in the EEZ in violation of 16 U.S.C. § 1857(1)(K)(ii).

ACCEPTED AND INCORPORATED

3. John Van Salisbury intentionally or negligently, and without authorization, removed, damaged, or tampered with lobster traps set in the EEZ that were owned by Adam Horvath and Joseph Horvath, Jr. in violation of 16 U.S.C. § 1857(1)(K)(i).

ACCEPTED AND INCORPORATED

4. The civil penalty assessed in this action is commensurate with the nature, circumstances, gravity, and extent of these violations, the respondent's culpability, and the respondent's prior enforcement history.

ACCEPTED AND INCORPORATED

5. The respondent entered no evidence about his ability to pay the assessed penalty.

ACCEPTED AND INCORPORATED

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing INITIAL DECISION by the means indicated to the following parties and limited participants indicated below:

J. Mitch MacDonald, Esq.
National Oceanic and Atmospheric Administration
Office of General Counsel, Northeast Region
One Blackburn Drive
Gloucester, Massachusetts 01930
Telephone: (978) 281-9379
Facsimile: (978) 281-9389
(Via Federal Express)

Jeffrey M. Miller, Esq.
Nasuti and Miller
The Public Ledger Building, Suite 1064
150 S. Independence Mall West
(6th & Chestnut Street)
Philadelphia, Pennsylvania 19106
(Via Federal Express)

ALJ Docketing Center
U.S. Coast Guard
40 South Gay Street, Room 412
Baltimore, MD 21202-0001
Telephone: (410) 962-7434
Facsimile: (410) 962-1746
(Via Facsimile)

Assistant General Counsel for Enforcement and Litigation
National Oceanic and Atmospheric Administration
8484 Georgia Avenue, Suite 400
Silver Spring, MD 20910
Telephone: (301) 427-2202
Facsimile: (301) 427-2211
(Via Federal Express)

Administrator
National Oceanic and Atmospheric Administration
Department of Commerce
Room 5128
14th Street and Constitution Avenue, N.W.
Washington, DC 20230
(Via Federal Express)

Done and dated June 13, 2007
New York, New York

Regina V. Maye
Paralegal Specialist to the
Administrative Law Judge